

Before The
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

Creation of a Low Power
Radio Service

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) MM Docket No. 99-25
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) RM-9208
) RM-9242
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FEDERAL COMMUNICATIONS COMMISSION
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To: The Commission

REPLY COMMENTS OF THE NEW YORK STATE THRUWAY AUTHORITY

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SUMMARY OF REPLY COMMENTS

The establishment of a low power FM radio service will serve the public interest by providing an opportunity for local communities to receive programming which may otherwise not be available to them. The proposals presented to the Commission in this proceeding, including limiting LPFM to noncommercial and government entities, eliminating second- and third-adjacent channel protection requirements for LPFM stations, granting LP100 stations primary status with respect to FM translators, and refusing entry into LPFM by pirate broadcasters, should be adopted, with the modifications set forth herein.

In order to secure the availability of spectrum for community-oriented and government-associated entities to provide programming services to their local communities, the Commission must limit the eligibility for LPFM to such noncommercial operators. However, it is imperative that "noncommercial" not be restricted to noncommercial educational organizations. State or local government entities, subdivisions, authorities, departments or corporations should be included in the term "noncommercial." To limit the service to noncommercial educational programming would unnecessarily limit opportunities for informational and safety programming.

The Commission should relax the interference standards for LP100 stations. Technical studies have been submitted by parties to this proceeding which suggest that the removal of both second- and third-adjacent channel protection requirements from LP100 stations will not result in interference to existing stations. Moreover, as the Commission has recognized, relaxed interference standards for low power FM stations may be the only way to establish the proposed service.

The Commission should grant LP100 stations primary status with respect to FM translators. Alternatively and at the very minimum, both LP100 stations and the translators should share secondary status. LP100 stations will be expected to initiate programming while translators will

continue to “rebroadcast” existing services. Translators will incur no new burdens by remaining in secondary status.

Finally, in order to maintain the integrity of a new low power FM service, the Commission should refuse to grant amnesty to those “pirate” broadcasters who have engaged in unauthorized and illegal broadcasting. Consistent with 47 U.S.C. § 308(b), any pirate broadcaster should be subject to the same character licensing requirements as other applicants.

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To: The Commission

REPLY COMMENTS OF THE NEW YORK STATE THRUWAY AUTHORITY

The New York State Thruway Authority ("NYSTA" or the "Thruway Authority"), by and through its counsel, hereby submits its reply comments in the above-captioned proceeding related to the creation of a low power radio service. The Commission's Notice of Proposed Rulemaking ("NPRM") sought comment on the proposed establishment of a low power FM radio service and regulations associated therewith.¹ NYSTA is one of over one thousand commenters, the vast majority of whom articulated general support for the establishment of LPFM while raising a variety of concerns reflective of the multiplicity of entities interested in this service. NYSTA reaffirms the positions advanced in its Comments and focuses these reply comments on the areas of agreement among and some of the concerns filed by the different interest groups.

¹ See *In the Matter of Creation of a Low Power Radio Service*, Notice of Proposed Rulemaking (hereinafter "*Low Power Radio NPRM*"), MM Docket No. 99-25, RM-9208, RM-9242 (released February 3, 1999) ¶19.

I. The Commission Should Limit Eligibility in Any Low Power FM Service to Noncommercial Entities.

NYSTA reiterates its strong belief that the Commission should limit eligibility of LPFM service to noncommercial entities and public sector organizations like the Thruway Authority because they will provide vital public services not currently performed by commercial licensees. NYSTA was encouraged to find that the majority of those parties participating in this proceeding who support the establishment of a LPFM service agree that it be limited to noncommercial entities. Indeed, even various commercial operators who oppose the service concede that, if authorized, LPFM should be limited to noncommercial operations.

A. Noncommercial Entities will Better Serve the Public Interest by Providing Vital Services and Diverse Interests through the Airwaves.

Like NYSTA, several government-associated commenters expressed the desire to utilize LPFM to provide a variety of services to their local communities, ranging from traffic information and emergency services to educational-based facilities that will provide students with an opportunity to learn the business of broadcasting.² To ensure that there will be sufficient spectrum to accommodate all of these needs, most government-associated commenters, including NYSTA, urged the Commission to limit the eligibility for LPFM to noncommercial and governmental entities. In addition, consumer and public interest groups, such as the Media Access Project, Microradio Empowerment Coalition and Ralph Nader, have also stressed the importance of establishing LPFM as a noncommercial service in order to serve the public interest.³ NYSTA agrees

² See Comments of the City of Seattle, the City of Allentown, Ohio State University and Northwest Missouri State University.

³ See Comments of United Church of Christ, Microradio Empowerment Coalition and Ralph Nader.

with the United Church of Christ that a “[n]oncommercial service will implement the goals of low power radio and fulfill the mission of many potential licensees.”⁴

Even several of the broadcasters who have consented to the Commission’s proposed establishment of low power radio agree that LPFM licenses should be restricted to noncommercial applicants.⁵ NYSTA notes Nassau Broadcasting Partners’ statement that if LPFM service is noncommercial, there will be “more emphasis on community-oriented programming rather than commercial enterprise programming.”⁶ Moreover, if the Commission were to open up the LPFM service to commercial entities, it would likely be overwhelmed with additional regulatory and enforcement burdens. For instance, Salem Communications Corporation suggests that the Commission must resolve all mutually exclusive commercial LPFM applications through a competitive bidding process in order to comply with Congressional mandates.⁷ However, as Big City Radio has acknowledged, if LPFM is only available on a noncommercial basis, the requirement of a competitive bidding process is eliminated.⁸

As stated in its Comments, NYSTA intends to use any LPFM service licenses it may acquire as a result of this proceeding to move its Travelers’ Advisory Service (“TIS”) from the AM band to the FM band. TIS is the primary medium by which NYSTA communicates public safety and travel advisory information to the motoring public. NYSTA does not have the funding or other resources to compete with large commercial interests for LPFM licenses. Therefore, probably the best and

⁴ Comments of the United Church of Christ, at p. 20.

⁵ See Comments of Nassau Broadcasting Partners, L.P., at p. 3; and Big City Radio, at p. 19.

⁶ Comments of Nassau Broadcasting Partners, L.P., at p. 3.

⁷ Comments of Salem Communications Corporation, at p. 28.

⁸ Comments of Big City Radio, at p. 19; also suggesting that, contrary to the Commission’s proposal, the mere fact that LPFM stations were not in existence when the Telecommunications Act of 1996 was drafted does not make a commercial LPFM station inapplicable to the laws governing “commercial radio station”.

only chance NYSTA will have to realize this important mission is if the availability of LPFM service licenses is limited to noncommercial entities.

B. "Noncommercial" Should Not be Restricted to Noncommercial Educational Organizations

The Commission's current regulations restrict the definition of "noncommercial" entities to noncommercial educational operators. NYSTA strongly believes that when contemplating the restriction of LPFM to noncommercial entities, the definition of "noncommercial" should be expanded to include state and local government entities, subdivisions, authorities, departments and corporations. NYSTA further agrees with Ralph Nader and those additional parties who propose that for the purposes of LPFM the term "noncommercial" should also include unincorporated, not-for-profit associations, and charitable organizations.⁹ Given the stated missions and responsibilities of these governmental and public service entities, they are the ones who will in fact fulfill the Commission's public interest goals in offering LPFM service. It is these noncommercial entities that will, like noncommercial educational associations, provide valuable services to the community.

It is vitally important that LPFM licenses, if limited to noncommercial entities and operations, not be further limited to educational programming. There is a wide variety of informational and safety programming that provides a significant public service but does not fall within the definition of educational programming, TIS is but one example. So while NYSTA believes that nothing should preclude low power FM stations from offering noncommercial educational programming, as currently required by the Commission's rules (47 C.F.R. § 73.503), there should be no similar requirements for low power FM. To do so would unnecessarily restrict the service to something that is currently readily available on the FM band and limit opportunities

⁹ See Comments of Ralph Nader, at p. 7.

for informational and safety programming which government entities are particularly suited to provide.

II. Opportunities Created by LPFM Outweigh the Little or No Risk of Interference Which May Result from Elimination of Second- and Third-Adjacent Channel Protection Requirements.

A. LP100 Stations Will Not Cause Interference to Existing FM Stations

The vast majority of concerns registered by parties filing comments related to removal of second- and third-adjacent channel protections were articulated by the broadcasters, all of whom fear the threat of interference from nearby LPFM stations. However, as the Commission noted in its NPRM, "relaxed interference standards for low power FM stations may be the only way to find sufficient spectrum in medium to larger markets to create any new viable service of 100 watts or more."¹⁰ Further, the Commission's technical staff has found that operation of LPFM service without third-adjacent channel protection requirements would, in the worst case, result in little risk of interference to existing radio service, and that any areas of potential interference would be very small.¹¹ NYSTA supports the Association of Federal Communications Consulting Engineers' technical studies which conclude that removal of *both* second- and third- adjacent channel protection requirements from LP100 stations will not result in interference to existing stations.¹² These findings, coupled with the reality that subjecting LP100 stations to the interference protection requirements would render the proposed service virtually useless, should allow for the elimination of second- and third-adjacent channel protection requirements for LPFM service.¹³

¹⁰ NPRM, at ¶ 44.

¹¹ *Id.*

¹² Comments of the Association of Federal Communications Consulting Engineers, at p. 16.

¹³ NYSTA's own studies concluded that the Thruway Authority could operate with minimum interference to even first-adjacent channels. See Comments, Exhibit A.

B. The Threat to Digital Radio by Removal of Channel Protection Requirements Has Not Been Established and Therefore Should Not Dictate the Treatment of the LPFM Service.

Many broadcasters have expressed the concern that any change to the Commission's current interference protections may prevent digital radio from becoming a reality.¹⁴ More specifically, these parties base their concerns on the assertion that LPFM may impact the In-Band On-Channel ("IBOC") digital audio broadcasting ("DAB") technology. In this proceeding, USA Digital Radio Partners, L.P. ("USADR"), the proponent of the IBOC technology, suggests that removal of channel protections for LP1000 stations will negatively impact DAB.¹⁵ USADR also urges the Commission not to proceed with the establishment of the LPFM services until more information on DAB and IBOC is available.¹⁶

The Commission has expressed its support for a conversion to digital radio but notes that in the existing radio environment, USADR has suggested that second-adjacent channel interference, were it to occur, from analog FM signals would not pose an interference threat to its IBOC signal.¹⁷ Even assuming the current allegations regarding the impact of low power FM on digital broadcasting to be true, which has not been established, USADR and the broadcasters are basing all of their concerns regarding LPFM and digital radio on a single digital radio technology that has not yet been introduced or formally taken under consideration by the Commission.

With LPFM, the Commission is proposing to make available spectrum and a radio service to serve better the public interest. LPFM can be an affordable, accessible outlet for public service

¹⁴ See Comments of National Association of Broadcasters, Consumer Electronics Manufacturers Association, Susquehanna Radio Corporation, Big City Radio, Clear Channel Communications, and Emmis Communications Corporation.

¹⁵ Comments of the USA Digital Radio, L.P., at p. 6.

¹⁶ *Id.*, at p. 5.

¹⁷ *NPRM*, at ¶ 17.

needs, such as traffic and safety information, community interests, etc. NYSTA strongly believes that progression toward serving the needs of the public should not be halted because low power radio may adversely affect a single digital radio technology. As digital radio becomes a reality, so will the appropriate technology and equipment – whether it be developed by USADR or its competitors. In the meantime, however, the Commission should not dismiss LPFM service solely because a single developer's digital radio technology may not be compatible with it.

III. FM Translator Services Should Not Receive Primary Status as a Result of the Establishment of a LPFM Service.

NYSTA acknowledges the Commission's reasons for proposing LP100 as a secondary service, and is encouraged by the Association of Communications Consulting Engineers' analysis, which submits that LP100 services may be designed on a "secondary" service basis without disrupting either the system or rendering disadvantageous the low power service itself.¹⁸ However, NYSTA strongly opposes the translators' proposal that they be given "primary" status over LP100 stations. Such a proposal was not contemplated by the Commission's NPRM which requested comments as to whether *LP100* stations should be primary with respect to the FM translators. Further, translators will be incurring no new burdens by remaining in secondary status even after creation of LPFM. The FM translators are merely "rebroadcasting" existing services. By contrast, LPFM systems will be expected to initiate programming and will incur the capital expenses associated with doing so. NYSTA supports the proposition that LP100 services should carry primary status with respect to FM translators. However, should the Commission determine it to be

¹⁸ However, NYSTA asks that the Commission examine the issue of forced change of frequency. As is currently the case when a full power stations must reimburse other full power stations for the costs of new transmission systems required by frequency changes, any costs related to new LP100 transmission systems which result from a forced change of frequency (tower moves, transmitter recalibration, etc.) should be borne by the new full power station.

in the public interest otherwise, at the very least, LP100 stations and translators should share the secondary status.

NYSTA and other potential LPFM service licensees are prepared to, and have been anxiously awaiting the opportunity to, offer valuable programming to the public at a considerable expense. If the Commission were to grant existing translators "primary" status with respect to LP100 services, or even provide them with "grandfathered" interference protection, the result will be that translators will possess the power to force low power FM stations off the air. When the regulatory requirements of each service are compared – LPFM stations will be required to initiate programming while translators will continue to "rebroadcast," – it becomes obvious that to grant FM translators "primary" status with respect to LP100 stations would be grossly inequitable to LPFM operators.

IV. "Pirate" Broadcasters Should Not be Granted Amnesty With Respect to the Current Standards for Character Qualification and Unauthorized Broadcasters.

NYSTA is unimpressed by any suggestion that previously unauthorized broadcasters "who have suffered government seizure and finds should be forgiven, have their property returned, and be prioritized for new licenses."¹⁹ NYSTA agrees with the National Association of Broadcasters that to grant these "pirate" broadcasters such amnesty would have the effect of rewarding them for their illegal behavior. Any pirate broadcaster should be subject to the same character licensing requirements as other applicants. 47 U.S.C. § 308(b).

As seems obvious from the level of interest in this proceeding, there will be much more interest in the new service than there will be available spectrum. It certainly would not seem appropriate for the Commission to inflate the already large pool of prospective LPFM licensees by

adding to it those parties who have already blemished their character qualifications by illegally broadcasting – whether having done so merely without a license or, as in some cases, without any regard to the safety precautions built into the Commission’s licensing system to protect FAA communications. Certainly, they are not entitled to any priority status as advanced by the City of Seattle.²⁰ NYSTA agrees with those parties who would have the LPFM licensees abide by the same character qualifications as any other broadcaster. Moreover, assuming the Commission establishes the LPFM service as a noncommercial service, designed to provide public service and community-oriented programming, the integrity of such a service should be preserved and the Commission should deny entry by those who have already proven to disregard its regulations.

CONCLUSION

NYSTA is optimistic about the Commission’s proposed establishment of a low power FM service. NYSTA strongly believes that the LPFM will serve the public interest by making spectrum available to those entities which are suited to provide safety and traffic information, community-oriented, and educational programming to the public. Moreover, LPFM will provide the opportunity to bring such programming through the radio to those communities where cable television and other communication forums are not available.

In summary, NYSTA urges the Commission to (i) limit the proposed LPFM service to noncommercial and public sector entities, without restricting it to noncommercial *educational* organizations; (ii) eliminate the second- and third- adjacent channel protection requirements from LP100 stations; (iii) grant LP100 stations primary status with respect to FM translators, and (iv)

¹⁹ Comments of the City of Seattle, Citizens Telecommunications and Technology Advisory Board, at p. 2.

²⁰ *Id.*

refuse to grant amnesty to those parties who have participated in unauthorized broadcasting practices.

The Commission's proposed establishment of low power FM, incorporating the proposals suggested herein and in NYSTA's initial comments, will have the effect of promoting the public interest, implementing the goals of and maintaining the integrity of low power radio, as well as fulfilling the important public service missions of many potential LPFM licensees.

Respectfully Submitted,

NEW YORK STATE THRUWAY AUTHORITY

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CERTIFICATE OF SERVICE

I, Shannon Conway, a staff attorney with Patton Boggs LLP, do hereby certify that I have on this day the 17th of September, 1999, caused to be hand-delivered, copies of the foregoing "Reply Comments of the New York State Thruway Authority" to the following:

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